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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 185.

S. J. SLIGH, PLAINTIFF IN ERROR,

vs.

JAMES A. KIRKWOOD, AS SHERIFF OF ORANGE COUNTY, FLORIDA.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

CHARLES B. ROBINSON,
Attorney for Plaintiff in Error.

(23,724)

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ERROR TO THE SUPREME COURT OF FLORIDA.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The Supreme Court of Florida, in the very short opinion written by it (page 16 of printed transcript), after citing a decision of the Indiana State Supreme Court which is, we think, not in point, relied wholly upon the decision of this court in Savage *vs.* Jones, State Chemist of Indiana, 225 U. S., 501. A careful examination, however, of the opinion of this court in Savage *vs.* Jones will show that the facts involved were totally different from the facts in the case at bar in several important particulars. We respectfully submit that the opinion in Savage *vs.* Jones not only fails to

support the decision of the Florida Supreme Court, but does support the contention made by the plaintiff in error here.

In Savage *vs.* Jones the act charged to be unconstitutional as a State regulation of interstate commerce was an act passed by the General Assembly of the State of Indiana to regulate (but not control) the distribution of food stuffs *within that State* and brought into the State from other States. This is exactly the reverse of the situation under discussion in the case at bar.

The statute involved in Savage *vs.* Jones was a police regulation pure and simple, requiring simply that the importers of "concentrated commercial feeding stuffs" into the State of Indiana disclose the ingredients of such food stuffs and comply with certain other reasonable requirements. It was not attempted by this statute to prohibit the importation of such food stuffs, but simply to regulate their sale within the State of Indiana and to prohibie such sale only in case of fraud or adulteration. This was a police regulation purely for the protection of the inhabitants of the State where the statute was enacted. It had no relation whatsoever to the shipment of such food stuffs from that State, nor was it designed to protect citizens of other States from consumption of adulterated foods.

Mr. Justice Hughes, at page 525 of the opinion in Savage *vs.* Jones, emphasizes this doctrine by saying: "But when the local police regulation has real relation to the suitable protection of the people *of the State,* and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce." This doctrine is again emphasized on page 528 of the same opinion which refers again to "feeding stuffs offered for sale in the State," meaning, of course, the State of Indiana, whose statute was under discussion.

Has, then, the decision quoted by the Florida Supreme Court any analogy to the case at bar? Has the Indiana statute under discussion there any analogy to the Florida statute which attempted to absolutely prohibit the shipment

to other States and countries of goods which are unquestionably articles of commerce and which are unquestionably the subject of legitimate and proper barter and sale between citizens of the State of Florida and citizens of other States and countries? And even were unripe citrus fruits necessarily deleterious to health (a fact which, if it were true, is not shown by the record) does the opinion of this court in Savage *vs.* Jones in any way support the contention that the legislature of the State of Florida may, under a guise of police regulation, attempt to protect the health of the citizens of other States and countries? We think not.

Finally we ask, was the Florida Supreme Court fair to itself in its discussion of Savage *vs.* Jones *supra?* In its opinion, page 18 of the transcript, we find in quotation marks what purports to be a literal quotation from the opinion of this court in Savage *vs.* Jones as follows: "While the State cannot, under cover of exerting its police power, directly regulate or burden interstate commerce a police regulation which has real relation to the proper protection of the people, and is reasonable in its terms, and does not conflict with any valid act of Congress, is not unconstitutional because it may incidentally affect interstate commerce." And what did this court really say in Savage *vs.* Jones? The nearest approach to the language quoted as above is found at page 525 of the text (25 U. S. Rep.) where this court said: "But when the *local* police regulation has real relation to the suitable protection of the people *of the State,* and is reasonable in its requirements it is not invalid because it may incidentally affect interstate commerce." The Florida court in making this quotation significantly omitted the word *"local"* and the words *"of the State"* found in the original text.

Respectfully submitted,

CHARLES B. ROBINSON,
Attorney for Plaintiff in Error.

Supreme Court of the United States

October Term, 1914

No. 185

S. J. SLIGH, Plaintiff in Error,

vs.

JAMES A. KIRKWOOD, As Sheriff of Orange County, Florida.

BRIEF FOR DEFENDANT IN ERROR

CHARLES B. PARKHILL,
Attorney for Defendant in Error

(23,724)

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Supreme Court of the United States

OCTOBER TERM, 1914

No. 185

S. J. SLIGH, PLAINTIFF IN ERROR,
vs.
JAMES A. KIRKWOOD, AS SHERIFF OF ORANGE COUNTY, FLORIDA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA

The plaintiff in error, Sligh, was informed against in the Criminal Court of Record in Orange County, Florida, in three informations, one of which charges, in the first count, that said S. J. Slight did, on the 16th day of October, 1912, in the County and State aforesaid, ship to Winecoff & Adams, at Birmingham, Alabama, one car of immature oranges, the same being citrus fruits.

In another count of said information it was charged that the said S. J. Sligh did deliver to an agent of the Seaboard Air Line Railway Company, a common carrier, for shipment to Winecoff & Adams, Birmingham, Alabama, one car of oranges, which were citrus fruits, and which were then and there unfit for consumption. See Transcript of record, page 2.

In the first count of the second information it was charged that the said S. J. Sligh did ship to Grantham Brothers, at Savannah, Georgia, fifty (50) boxes of immature oranges, the same being citrus fruits. In the second count of this information it was charged that the said S. J. Sligh did deliver to an agent of the Seaboard Air Line Railway Company, a common carrier, for shipment to Grantham Brothers, Savannah, Georgia, fifty (50) boxes

of oranges which were citrus fruits, and which were then and there immature and unfit for consumption.

In the third information it was charged that the said S. J. Sligh did deliver to an agent of the Tavares & Gulf Railway Company, for shipment to S. J. Sligh & Company, at Waycross, Georgia, one car of oranges, which were citrus fruits, and were then and there immature and unfit for consumption.

Upon habeas corpus, the defendant, James A. Kirkwood, Sheriff of Orange County, Florida, filed his return, setting up that he held the defendant, Sligh, and that the cause of his detention and imprisonment was three separate capiases and warrants for the arrest of the said S. J. Sligh, issued out of the Criminal Court of Record in and for Orange County, as mentioned above. Upon hearing the Circuit Judge remanded Sligh. He sued out a writ of error to the Supreme Court of the State of Florida, and that Court affirmed the judgment of the lower court.

ARGUMENT

As stated by counsel for plaintiff in error, the only question presented here is that of the unconstitutionality of Section 1, Chapter 6236 of the Laws of Florida, 1911, the first section of which is as follows:

> "Section 1. That it shall be unlawful for any one to sell, offer for sale, ship or deliver for shipment any citrus fruits which are immature, or otherwise unfit for consumption, and for any one to receive any such fruits under a contract of sale, or for the purpose of sale, or of offering for sale or for shipment or delivery for shipment. This section shall not apply to sales or contracts for sale of citrus fruits on the trees, under this section; nor shall it apply to common carriers, or their agents, who are not interested in such fruits, and who are merely receiving the same for transportation."

This act is constitutional and a valid exercise of the police power of the State. It is designed to promote the public health, and the police power of the State embraces regulations for that purpose.

The power of the State to impose restraints upon persons and property in conservation and promotion of the public health, good order and prosperity is a power originally and always belonging to the States, not surrendered by them to the general government, not directly restrained by the Constitution of the United States, and essentially exclusive.

Wilkerson v. Roher, 140 U. S., 545, 35 L. Ed., 573.

The regulation of food stuff has in view the protection of health.

Freund Police Power, Chapter 28, 232.

The term "provisions" means "food." Oranges are highly nutritious and are food.

State v. Angello, 71 N. H. 224; 51 Atl. 905; 6 Words & Phrases, 5754.

Any substance which, taken into the body, is capable of sustaining or nourishing the living is food.

13 A. & E. Enc. of Law (2nd Ed.) 729; 3 Words & Phrases, 2856; Arbuckle v. Blackburn, 113 Fed., 616, 622.

The term "fruit" includes oranges.

Humphreys v. Union Ins. Co., (U. S.) 12 Fed. Cas., 876, 880; 4 Words & Phrases, 2994.

Section 1, Chapter 6336, Acts of 1911, Laws of Florida, now under consideration, provides that it shall be unlawful to sell, offer for sale, ship or deliver for shipment, any citrus fruits which are immature or otherwise unfit for consumption.

One of the informations filed against the plaintiff in error, Sligh, covers citrus fruits, which are not only immature, but otherwise unfit for consumption. Clearly this statute is designed to protect the public health.

As said by the court in Peo. v. Chiperly, 101 N. Y. 634, 4 N. E. 107:

> "Now an examination of the present law clearly shows that it relates to, and is appropriate to promote the public health. Whether its details are wise we do not know; but its object is evident and good. Its first section forbids the sale of unclean, impure, unhealthy, adulterated, or unwholesome milk."

But, it is contended that this statute is in controvention of the commerce clause of the Constitution of the United States. This statute does not, as contended by counsel for plaintiff in error, seek to limit, regulate and control interstate commerce.

To constitute interstate commerce there must be an article or commodity, the subject of commerce, and destined to pass from one State to another. Only such commodities as may *lawfully* become the subjects of purchase, sale or exchange, are articles of interstate commerce, within the protection of the commerce clause of the Constitution.

7 A. & E. Enc. of Law, (2nd Ed.) 67, 68.

In Turner v. Maryland, 107 U. S. 17 Attr. 38, 27 L. Ed. 370, text 376, the court said:

> "It was lawful to require the article to be subjected to the prescribed examination by a public officer before it can be a lawful subject of commerce. The State has a right to say what shall be lawful, merchantable tobacco."

Then the State of Florida has a right to say what shall be lawful, merchantable citrus fruits.

Articles which, on account of their existing condition, would bring and spread disease or pestilence, and meats or other provsions unfit for human use, are not legitimate subjects of trade and commerce, and are not within the protection of the commerce clause of the Constitution, but fall within the police power of the State.

17 A. & E. Enc. of Law, (2nd Ed.) 67, 68, and cases cited.

When the Legislature of Florida prohibits the sale or shipment of immature citrus fruits, or fruits unfit for consumption, it

thereby prevents said citrus fruits from becoming an article of interstate commerce.

In Peo. v. Hesterberg, 211 U. S. 31, 53 L. Ed. 75, this Court said:

> "The power of a State to protect, by adequate police regulation, its people against the adulteration of articles of food, although, in doing so, commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the State, which can become the subject of ownership in a qualified way, and which can never by the object of commerce except with the consent of the State, and subject to the conditions which it may deem best to impose for the public good."

In Dent v. West Virginia, 129 U. S. 114, the court said:

> "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as deception and fraud."

In Plumely v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. Rep. 154, the court said:

> "If there by any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which, it ought not to be supposed, was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State."

In Purity Extract & T. Co. v. Lynch, U. S. Sup. Ct. Rep., Oct. Term, advances sheets No. 3, 57 L. Ed. U. S. Reports 184, 226 U. S. 192, the court said:

> "It is also well established that, when a State exerting its recognized authority, undertakes to suppress what it is

free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered is innocuous, it may not be included in a prohibition, the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended."

In the case of State v. Harrub, 95 Ala. 176, 36 Am. Rep. 195, the Supreme Court of Alabama while considering a statute providing that it shall be unlawful for any person to ship beyond the limits of the State any oysters taken from the waters of that State while the same are in the shell, said:

> "Until it becomes an article of interstate commerce, Congress has no authority or control in the premises. * * * The error in the argument of the defendant's counsel is in assuming that the oyster in the shell was an article of commerce."

The power of Congress to regulate interstate commerce does not interfere with the right of the State to prohibit its own property from becoming an article or commodity of interstate commerce, and a statute may take private property out of the commerce clause of the Constitution, may outlaw such private property, if it be inherently bad or liable to affect the health, prosperity or welfare of the people of the State.

The police power of a State embraces regulations designed to promote the public convenience or the general prosperity or the public welfare, as well as those designed to promote the public safety or the public health.

Chicago B. & Q. R. R. Co. v. Peo. State of Ill. ex rel; Drainage Com'rs., 250 U. S. 561, 26 Sup. Ct. Rep. 341;

Lake Shore & M. S. Ry. Co. v. State of Ohio, 173 U. S. 285, 19 Sup. Ct. Rep. 465, 43 L. Ed. 702; A. C. L. Ry. Co. v. Coachman, 59 Fla. 130, 52 So. 377, 380.

In Commonwealth v. Savage, 29 N. E. Rep. 468, the court held:

> "A statute which prohibits the selling, offering for sale, etc., lobsters less than ten and one-half inches in length, applies to lobsters caught in and sent from the British possessions."

In the body of the opinion the court said:

> "The object of the Legislature was to protect the growth of lobsters in our own waters, and the Legislature no doubt thought that the most effectual way to accomplish that purpose was to make it penal for any person to have in his possession any lobsters under the length fixed by the statute. That such a law may in some cases operate harshly, if rigorously enforced, cannot be denied, but that is a matter with which we cannot deal. The fact that the lobsters were caught in and sent from the British provinces to the defendant, and that, as soon as discovered, those found to be of short length were returned alive in to tide-water by him, cannot avail him as a defense to the complaint."

Where a law is for the protection of the life, liberty and prosperity or the general welfare, there is no limitation upon the power of the Legislature except as is found in the Constitution.

Hawthorn v. Peo. 019 Ill. 302; 52 Am. Rep. 610.

The police power extends to regulations to preserve the reputation of the States in foreign markets.

Freund Police Power, Sec. 276; Critsman v. Northup 8 Cow. (N. Y.) 46.

The Legislature may have known that immature citrus fruits,

or citrus fruits unfit for consumption, shipped beyond the limits of the State of Florida would destroy the reputation of this important product of the State in the markets of the world. The Legislature may have also known that the taking of immature citrus fruits from the trees would injure the trees and thus hurt the prosperity of the people of the State. The Legislature may have known that the sale of immature oranges might cause the sale of immature and poor seed for the planting of orange groves, and thus hurt the prosperity of the State.

In Plumely v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. Rep. 154, it was held that a law of the State of Massachusetts which prevented the sale of oleomargarine colored in the imitation of butter, was a legal exertion of police power on the part of the State, although oleomargarine was a wholesome article of food, transported from another State; and this upon the principle that the Constitution did not intend, in conferring upon Congress an exclusive power to regulate interstate commerce, to take from the States the right to make reasonable laws concerning the health, life and safety of the citizens, although such legislation might indirectly affect foreign or interstate commerce.

In Sherlock v. Alling, 93 U. S. 99, it was said:

> "And it may be said generally, that the legislation of a State, not directed against commerce or against any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon the citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or any other pursuit."

In Dent v. West, Virginia, 129 U. S. 114, the court said:

> "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as deception and fraud."

As stated in 17 Am. & Eng. Ency. of Law (2nd Ed.) 67, 68:

> "Only such commodities as may lawfully become the subjects of purchase, sale or exchange are articles of interstate commerce, within the protection of the commerce clause of the Constitution. Articles which, on account of their existing condition, would bring and spread disease or pestilence, and meats or other provisions unfit for human use are not legitimate subjects of trade and commerce and are not within the protection of the commerce clause of the Constitution, but fall within the police power of the State."

As stated in Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. Ed. 184:

> "The inquiry must be whether, considering the end in view, the statute passes the bound of reason and assumes the character of a merely arbitrary fiat."

For the reasons heretofore stated we submit the provisions of our Act of 1911 bear a reasonable relation to the evil sought to be cured, and this court will uphold same.

A late utterance of the United States Supreme Court on this subject will be found in Eubank v. City of Richmond, decided December 2nd, 1912, and reported in 226 U. S. 137, 33 S. Ct. Rep. 76, 57 L. Ed. 156, as follows:

> "Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. Chicago B. & Q. R. R. Co. v. Illinois, 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175. And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable powers of the government'."

A statute of Vermont makes it unlawful to ship *out of the State*

for food purposes the flesh of a calf which is less than *four* weeks old when killed.

In State v. Peet, 80 Vt. 449, 68 Ata. 661, 130 Am. St. Rep. 998, 14 L. R. A. (U. S.) 678, the court held the indictment bad, because, under the Federal Act, the Secretary of Agriculture had issued regulations requiring the carcasses of calves under three weeks of age to be condemned.

As pointed out by the Supreme Court of Florida, in Sligh v. Kirkwood, the instant case, 65 Fla. 123, 61 So. Rep. 185, the statute now being considered does not conflict with the Food and Drugs Act of Congress of June 30, 1906, because the Act of Congress only bars fruit in an over-ripe or decomposed state, and says nothing as to green or immature fruit, and, as stated by the court, "green or immature fruit may be as injurious to health as the same fruit in an over-ripe or decomposed state."

In the case of Savage v. Jones, State Chemist of Indiana, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182, it is held:

> "That while the State cannot, under cover of exerting its police power, directly regulate or burden interstate commerce, a police regulation which has real relation to the proper protection of the people, and is reasonable in its terms, and does not conflict with any valid act of Congress, is not unconstitutional, because it may incidentally affffect interstate commerce."

As the restrictions imposed by the Florida Act of 1911 tend to the protection of the health, prosperity and welfare of the people of the State of Florida, it is unnecessary to reply to the argument by counsel for plaintiff in error relating to the right of the people of Florida to compete in the open markets with citizens of other States, or the desire of our own people to buy and use immature citrus fruits, or fruits unfit for consumption.

A similar contention was made in New York ex rel Sitz v. Hesterberg, 211 U. S. 31, but, as pointed out by this court in Purity Extract & Tonic Co. v. Lynch, supra, even though the possession of plover and grouse had been lawfully taken abroad during the open season and lawfully brought into the State and different varieties from plover and grouse in New York and

could be easily distinguished from the latter and were wholesome and valuable articles of food, the legislature of the State was authorized to pass measures for the protection of the people of the State in the exercise of police power and is itself the judge of the necessity or expediency of the means adopted, and it was pointed out by the court that the prohibition was expedient, "owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were taken in another State or country."

Our statute does not aim, in terms, at shipment of immature fruits outside the State, but makes it a crime to sell or offer for sale or deliver for shipment in the State, and if a person could ship out of the State and ship the fruit back in the State the people would be injured in their health; and a man could sell fruit, not shipped out of the State, by claiming the same to have been shipped into the State.

The judgment of the Supreme Court of Florida should be affirmed.

CHARLES B. PARKHILL,
Attorney for Defendant in Error.